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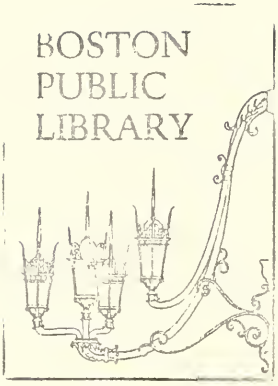
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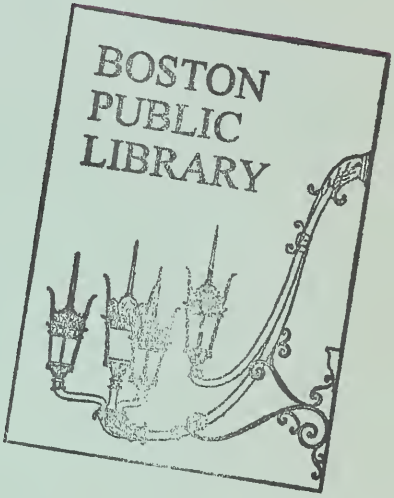
CERTAIN LEGAL PROBLEMS SUGGESTED BY THE CREATION OF NEW TOWNS IN MASSACHUSETTS

by

Eloise Logsdon Morgan



Submitted April 15, 1969

The Commonwealth of Massachusetts

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CERTAIN LEGAL PROBLEMS SUGGESTED BY
THE CREATION OF NEW TOWNS IN MASSACHUSETTS

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Eloise Logsdon Morgan
April 15, 1969

CERTAIN LEGAL PROBLEMS SUGGESTED BY THE CREATION OF NEW TOWNS IN MASSACHUSETTS

Introduction

One of the most anbitious solutions suggested to deal with the multitude of ills popularly described as America's "urban crisis" is to create fresh new cities and communities. On a clean slate, unblemished by the constraints of past errors and pre-existing interests and rights, the city designer is presented with unparalleled freedom to innovate. Ebenezer Howard, an Englishman credited with orginating, in the 1890's, the "new towns" idea,[1] visualized a series of carefully-positioned, moderate-sized, self-sufficient "Garden Cities" separated from each other and existing urban centers by "greenbelts," in which contented Englishmen savored the best aspects of both urban and country living.[2] On the contemporary American scene, new towns would necessarily assume a more modest role, influenced by economic, social and political realities. Even on

1. L. Rodwin, The British New Towns Policy 9 (1956).

2. E. Howard, Tomorrow: A Peaceful Path to Real Reform (1898), later published as Garden Cities of Tomorrow.

this less elevated scale, the new towns approach,[3] implemented as new or expanded communities on the fringes of metropolis or as full-blown new cities in virgin territories, has much to offer America.

Properly designed, the created city could avoid such current urban afflictions as environmental polution, economic and racial housing segregation, inadequate transportation systems, shortages of low and moderate cost housing and lack of recreation open space.[4] From initial construction and throughout its realization as a functioning urban center, a new town would provide needed jobs for an expanding population.[5] The new town could channel sprawling urban growth into coordinated and cohesive patterns of community growth.[6] Stagnant rural areas, stimulated and supplemented by a new urban center, might exert a new hold on their migrating citizenry.[7] As virgin developments, new towns could serve as vehicles

3. The terms "new city," "new town" and "new community" are used interchangeably in this paper. Technical distinctions which exist between them are irrelevant to the issues treated here.

4. American Institute of Planners, Background Paper No. 2, New Communities: Challenge for Today 7-8 (1968) (hereinafter cited as AIP Background Paper No. 2); Advisory Commission on Intergovernmental Relations, Urban and Rural America: Policies for Future Growth, ch. IV: New Communities in America and Their Objectives (1968) (hereinafter cited as ACIR: Urban and Rural America).

5. AIP Background Paper No. 2, supra note 4, at 2; S. Rep. No. 1106, 90th Cong., 2d Sess. 48 (1968).

6. ACIR: Urban and Rural America, Supra note 4, at 62; S. Rep. No. 1106, supra note 5, at 48 (1968).

7. S. Rep. No. 1106, supra note 5, at 51 (1968).

for experimental planning and land use techniques.[8] Finally, unlike existing metropolitan areas which usually are divided among dozens of conflicting and overlapping municipal authorities, the new city would provide an opportunity to experiment with more functional units of government.[9]

Despite these possibilities, new town building in this country has been relatively unknown. Projects are estimated to number from as few as 15 to 250, hinging on what kinds of developments are classified as new communities.[10] Many such projects have proved to be little more than well-planned upper- and middle-class suberbs.[11] Probably less than half a dozen of the so-called new towns actually approach the classic concept of a full-fledged urban center.[12] The two most well-known new towns, Columbia, Maryland, and Reston, Virginia, are both far from successful completion.

Two major impediments to privately-sponsored new town building are the immense expenditures necessary to acquire the land and install basic facilities and the extraordinarily long period of time before the first

8. Id. at 48; ACIR: Urban and Rural America, supra note 4, at 101.

9. ACIR: Urban and Rural America, supra note 4, at 102.

10. Id. at 77.

11. Time, March 7, 1969, at 25.

12. AIP Background Paper No. 2, supra note 4, at 16.

returns on the investments are realized.[13] Financial problems have plagued many "new towns,"[14] from the first project at Radburn, N. J., (modeled after Howard's Garden City concept), which failed to reach fruition due to financial problems during the depression years,[15] to Reston, Va., which was refinanced in 1967 by Gulf Oil Corporation after several years of serious financial problems.[16] Big corporations, such as General Electric, have abandoned plans to develop new communities as unprofitable.[17] The apparent success of one recent venture, Havasu City, Ariz., stems in no small measure from political influence combined with fantastic good luck[18] to provide the lowest site acquisition costs per acre of any of the "new town" developments for which figures are available.[19] The ability of private enterprise on its own to create new communities on a

13. S. Rep. No. 1106, supra note 5, at 48 (1968).

14. ACIR: Urban and Rural America, supra note 4, at 87-89

15. C. Stein, Toward New Towns for America 47 (1951)

16. ACIR: Urban and Rural America, supra note 4, at 88.

17. Newsweek, March 17, 1969, at 42, col. 2.

18. See W. Robins, How to Build a River in the Arizona Desert to Flow Under the London Bridge, Esquire, February, 1969, at 78.

19. ACIR: Urban and Rural America, supra note 4, at 87.

national scale is now being seriously questioned.

> "...the record shows that fiscal pressures have made it difficult, if not almost impossible, to adhere rigorously to imaginative and innovative plans for physical design and a range of amenities. Moreover, these pressures for all practical purposes have barred any realization of the broader economic and social goals of providing low-income housing in addition to middle-income and luxury housing or a range of employment opportunities."[21]

In contrast to the American experience, European governments, most notably the English, have taken an active role in the development of new cities.[22] The English New Towns Act of 1946[23] empowered the Ministry of Housing and Local Government to select sites for new towns. Public development corporations then acquire the land (by compulsory purchase, if necessary,) plan the town, construct the facilities and, where necessary, manage the town for a limited period of time. The finalized city plan must receive approval from local authorities, but the development corporation is exempted from the local planning authority's control. Today, 21 nationally-planned new communities[24] dot the British Isles. Other European countries, such as Sweden, Finland, France and Netherlands, are also building new cities as part of a national plan

20. AIP Background Paper No. 2, supra note 4, at 16

21. ACIR: Urban and Rural America, supra note 4, at 89.

22. W. Thomas, New Towns Development, 1965 Wash. U. Q. 1.

23. New Towns Act of 1946, 9 & 10 Geo. 6, c. 68.

24. ACIR: Urban and Rural America, supra note 4, at 67.

for development.[25]

In this country, a modest beginning on the Federal level to deal with the financial problems of establishing new towns has just been made. The New Communities Act of 1968 (Title IV of the Housing and Urban Development Act of 1968)[26] provides Federal guarantees of loans to private developers, up to $50 million per project, to help finance qualified new community projects. Total guarantees are not to exceed $500 million at any one time. Seventeen formal applications for loan guarantees have already been submitted to the Department of Housing and Urban Development and $30 million has been tentatively committed to Park Forest South, 28 miles south of Chicago.[27] Federal mortgage insurance for new communities was made available in 1966[28] on a limited basis. Haphazard location of developments spurred by such legislation, however, will cripple their potential to structure our future urban growth. Governmental coordination of the new community effort seems necessary to meet this

25. Id. at 65; See also S. Woods, Le Mirail, A New Quarter for the City of Toulouse, 1965 Wash. U. L. Q. 4; M. Sweet and F. Jensen, The Planned Community, 51 Nat. Civ. Rev. 251 (1962).

26. 82 Stat. 476, S. 401.

27. Time, March 7, 1969, at 25.

28. Title X of the National Housing Act. 80 Stat. 1271, 12 U.S.C. 1749cc. Also available are Federal grants to Governmental planning agencies to plan for areas where rapid urbanization is expected to result from the development of a new community under either Title IV of the Housing and Urban Development Act of 1968, supra note 25, ot Title X of the National Housing Act, 73 Stat. 678, 40 U.S.C. 461.

end.[29] The American Institute of Planners has called for a national settlement policy to insure the orderly planning and development of new urban centers.[30]

Traditional American distrust of Federal inroads upon State and local affairs is likely to continue to preclude for some time any national program of urban planning similar to the European schemes. Consequently, the first effective coordinated planning for new cities will probably be at the State level. In 1967, at least two states had overall development policies which considered new community projects; seven others were developing or had such plans under consideration.[31]

While much has been written about the new town concept in general and about foreign experience in implementing this type of program,[32] very little published consideration has been made of the many American legal problems which civil authorities will encounter in any proposals for publically-sponsored new town programs. It is hoped that the following analysis of certain questions of land use law posed by new city programs will help to fill this void. These issues are approached from the State government viewpoint, not only because this is the highest level at which current interest is being evidenced, but because it does not appear that effective coordinated planning can be any more localized.

29. W. Thomas, New Towns Development, 1965 Wash. U. L. Q. 1, at 3.

30. AIP Background Paper No. 2, supra note 4, at 1-5.

31. ACIR: Urban and Rural America, supra note 4, Table 42, at 83.

32. Housing and Home Finance Agency, New Communities; a Selected, Annotated Reading List (1965).

Two basic land use issues among the many presented by government-sponsored new community building have been selected for study: First, does new city creation qualify as a "public use" justifying the exercise of eminent domain. Many commentators agree that legislation authorizing condemnation to facilitate site assembly and to insure reasonable costs of land acquisition is essential.[33] Second, can an area designated as a future new town site be protected from inconsistent development if the State is not politically or financially prepared to proceed immediately with construction.

The analysis is based largely on Massachusetts case[34] and statutory law, not because it is particularly typical, although much of what is said does have broader application, but because the State is among

33. AIP Background Paper No. 2, supra note 4, at 20; C. Stein, Toward New Towns for America 68 (1951); and ACIR: Urban and Rural America, supra note 4, at 100.

34. The Massachusetts Supreme Judical Court has written many opinions advising the legislature on the constitutionality of proposed legislation. The advisory opinions have no precedential or binding effect. When presented with an actual case, the court will consider the same questions "anew unaffected by the advisory opinion." Dodge v. Prudential Insurance Co. of America, 343 Mass. 375, at 380, 179 N. E. 2d 234, at 239 (1961). Obviously, however, advisory opinions furnish a very good basis for predicting the outcome of litigation on identical or similar issues, and many are cited in this paper.

the first to begin to grapple with these issues.[35] Consequently, solutions arrived at in this Commonwealth may serve to some extent as prototypes in State new town programs.

PART 1. EMINENT DOMAIN POWER AND NEW TOWNS

Condemnation is generally seen to be necessary as a "last resort" tool to acquire the land necessary for a new city site.[36] Understandably, there will be some landowners who, if allowed to refuse to cooperate with the development program, could destroy or seriously hamper the entire project either by refusing to sell

35. Massachusetts' new Dept. of Community Affairs, established Nov. 1, 1968, as the State's principal agency for coordinating and implementing community planning and development in the Commonwealth, has responsibility in the field of new town development. See Mass. Gen. Laws Ann., Ch. 23B, .3(i). This year it proposed legislation to set up a State Land Development Agency patterned on the suggested format of the Advisory Commission on Intergovernmental Relations' State Legislative Program: New Proposals for 1969." at 507-1 et seq. Also, a private Massachusetts group. Citizens Housing and Planning Association, has been preparing similar legislation based on N. Y. Unconsol. Laws ss.6251-6285 (McKinney Supp. 1968-69).

36. Interestingly, two current proposals for new city creation in the Commonwealth would probably not necessitate the use of eminent domain because little or no existing land would be involved. Noted architect R. Buckminister Fuller has proposed "floating cities" of up to 100,000 people, consisting of a series of floating neighborhoods anchored in a city harbor. Boston Globe, Nov. 10, 1968, at A-49, col. 1. Boston city planners and MIT are researching the practicality of filling ½ mile of open sea between Columbia Point and Thompson Island for a new community, hopefully to be created in connection with Expo '76, U. S. bicentennial celebration. Boston Globe, Nov. 24, 1968, at B-3, col. 1 and Mar. 9, 1969, at A-15, col. 1.

at all or by demanding exorbitant prices. Eminent domain power is necessary to deal with these situations.

Massachusetts' eminent domain law is based on Article X of the Declaration of Rights in the State Constitution which provides:

> "...no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that or the representative body of the people.... And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

Two approaches to the use of eminent domain in new city development have been suggested. The power to condemn might be delegated to the developer,[37] or a public agency itself could condemn the land, clear and prepare the area, and sell it to a developer--perhaps for less than cost.[38] In either case, the basic question raised by the use of eminent domain is whether building new towns is a "public use" which warrants the forced sale of private property to the State.

No court has yet faced this precise question. However, the requirement of public use which limits eminent domain takings is not a static, inflexible concept. Through the years, courts have recognized that the doctrine must be construed in light of contemporary

37. Mass. Dept. of Community Affairs, "Problems in Defining Legislation for New Communities," April 9, 1968 (unpublished preliminary draft).

38. Victor Gruen Associated, New Cities U. S. A., A Statement of Purpose and Program, prepared for the Dept. of Housing and Urban Development 31 (1966).

needs.[39] Each case will be judged "upon its own peculiar circumstances," with reference "to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare."[40] Further, "weight will be given to legislative findings of fact as to existing conditions material in such determination."[41] How much weight is not clear, but the Massachusetts Supreme Judicial Court has said that such findings are "significant."[42]

39. P. Nichols, The meaning of Public Use in the Law of Eminent Domain, 20 B. U. L. Rev. 615 (1940); Mass. H. Rep. No. 3657, January, 1962, at 8.

40. Allydonn Realty Corp. V. Holyoke Housing Authority, 304 Mass. 288, at 292,23 N. E. 2d 665, at 667 (1939).

41. McLean V. City of Boston, 327 Mass. 118, at 121, 97 N. E. 2d 542, at 544 (1951).

42. Tate V. City of Malden, 334 Mass. 507, 136 N. E. 2d 188 (1956). In limiting their review to the validity of the public purpose involved, the courts have not questioned legislative determinations as to whether and on what basis there was a necessity for the taking. See Stockus V. Boston Housing Authority, 304 Mass. 507, 24 N. E. 2d 333 (1939). Further, once a public purpose is found, the court apparently reviews the agency's application of legislative standards to specific takings only to see that they are not "arbitrary or capricious." Worcester Knitting Realty Co. V. Worcester Housing Authority, 335 Mass. 19, 138 N. E. 2d 356 (1956). In Worcester, the court also said that determination of the boundaries of the areas involved was for the agency and was not to be retried in the courts. See also, Moskow V. Boston Redevelopment Authority, 349 Mass. 553, 210 N. E. 2d 699 (1965), cert. den. 382 U.S. 983 (1966); McAuliffe & Burke Co. V. Boston Housing Authority, 334 Mass. 28, 133 N. E. 493 (1956); Omartian V. Mayor of Springfield, ____ Mass. ____ 238 N. E. 2d 48 (1968).

A. The History of Public Use

In primitive America, because eminent domain was seldom exercised, a broad definition of public use was acceptable. Thus, by 1832, the public benefit resulting from the exploitation of natural resources had long been regarded as an adequate basis to establish public use.[43] Subsequently, however, abuses by private donees of the power of condemnation triggered concern that such a broad doctrine provided scant protection from wholesale expropriation. In the 1840's and 50's, courts began to construe public use more strictly--as "use by the public." By the end of the century, though, exceptions to the new narrow construction had appeared for the development of natural resources, often in state constitutional amendments.[44] Novel schemes of land use and development, such as early urban renewal projects, still ran afoul of the narrow "use by the public" formulation of the land involved was to be resold immediately after condemnation to private developers. The courts viewed the public benefit from such projects as obviated by the

43. Boston and Roxbury Mill Corp V. Newman, 29 Mass. (12 Pick.) 467 (1832).

44. See, e. g., Mass. Amend. Art. 49 (1918).

private advantages given the developers.[45] Not until the late 1930's and 40's was this view reversed when numerous courts validated the use of eminent domain in New Deal housing and slum renewal projects.[46]

The turning point in Massachusetts came in a 1939 case, Allydonn Realty Corp. v. Holyoke Housing Authority, where the court held that "an expenditure is not necessarily barred because individuals as such may profit..."[47] Currently "public use" in Massachusetts requires that the public aspects of a project outweight any benefit to private persons.[48] The state's courts have continued, however, to hold that eminent domain is permissible only for purposes which involve some--however slight-- direct use by the public.

45. In re Opinion of the Justices, 24 Mass. 624, 98 N. E. 611 (1912); Salisbury Land & Improvement CO. v. Commonwealth, 215 Mass. 371, 102 N. E. 619 (1913).

46. For detailed treatment of the history of the public use doctrine in eminent domain law see: P. Nichols, the Meaning of Public Use in the Law of Eminent Domain, 20 B. U. L. Rev. 615 (1940); and I. Robbins and M. Yankauer, "Eminent Domain in Acquiring Subdivision and Open Land in Redevelopment Programs: A Question of Public Use," Urban Redevelopment Problems and Practices 463 (Woodbury ed. 1953).

47. 304 Mass. 288, at 293, 23 N. E. 2d 665, at 667 (1939).

48. Opinion of the Justices, 334 Mass. 760, 135 N. E. 2d 665 (1956); Papadinis v City of Somerville, 331 Mass. 627, 121 N. E. 2d 714 (1954).

"... only a relatively small portion of the inhabitants may participate in the benefits, but the use or service must be of such nature that in essence it affects them as a community and not merely as individuals."[49]

As shown by an examination of the cases, the condition of the land to be taken is very relevant to a finding of public use.

B. Condemnation of Blighted Land for New Towns

The exercise of eminent domain for slum clearance[50]

49 Machado v. Board of Public Works of Arlington, 321 Mass. 101, 71 N. E. 2d 886 (1947). Here narrow strips of two citizens' lots were condemned to connect an adjoining lot to the municipal sewer line. The lot's owner had been ordered by the health board to abate the nuisance created by his cesspool. The court, upholding the condemnation, said the elimination of the cesspool was beneficial to the health and welfare of the town as a whole, not just to the individual owner.

50. Most Massachusetts slum clearance cases have involved Mass. Gen. Laws Ann., ch. 121, which provides for clearance and redevelopment of so-called "sub-standard areas" and "decadent areas" as defined in s. 26J:

"Sub-standard area, " an area wherein dwellings predominate which, by reason of dilapidation, overcrowding, faulty arrangement or design, lack of ventilation, light, or sanitation facilities, or any combination of these factors, are detrimental to safety, health, morals, welfare or sound growth of a community."

"Decadent area," an area which is detrimental to safety, health, morals, welfare or sound growth of a community because of the existence of buildings which are out of repair, physically deteriorated, unfit for human habitation, or obselete, or in need of major maintenance or repair, or because much of the real estate in recent years has been sold or taken for non-payment of taxes or upon foreclosure of mortgages, or because buildings have been torn down and not replaced and in which under existing conditions it is improbable that the buildings will be replaced, or because of a substantial change in business or economic conditions, or because of inadequate light, air, or open space, or because of excessive land coverage, or because diversity of ownership, irregular lot sizes or obsolete street patterns make it improbable that the area will be redeveloped by the ordinary operations of private enterprise, or by reason of any combinations of the foregoing conditions.

was validated in the Allydonn case, supra:

> "We cannot say that expenditures directed in a rational manner towards the elimination of slums are not expenditures for a public purpose.... The elimination of slums can be found to be a direct benefit and advantage to all of the people..."[51]

The improvement of the appearance and attractiveness of a slum area is also a valid public use.[52] The provision of public housing facilities as a "means" of slum clearance has been held to be for a public purpose.[53] Commercial redevelopment of a slum area has been approved as well.[54] These types of redevelopment projects are not limited to slum areas only. Condemnation to clear and redevelop so-called "blighted" open areas has also been upheld.[55]

"Blighted open land" has been defined very broadly in Massachusetts. See Mass. Gen. Laws Annotated, ch. 121A, S. I.

51. Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, at 294, 23 N. E. 2d 665, at 668 (1939).

52. Bowker v. City of Worcester, 334 Mass. 422, 136 N. E. 2d 208 (1956).

53. Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 23 N. E. 2d 665 (1939).

54. Bowker v. City of Worcester, 334 Mass. 422, 136 N. E. 2d 208 (1956)

55. Opinion of the Justices, 334 Mass. 760, 135 N. E. 2d 665 (1956); Opinion of the Justices to the Senate and the House of Representatives, 341 Mass. 760, 168 N. E. 2d 858 (1960); Dodge v. Prudential Insurance Co. of America, 343 Mass. 375, 179 N. E. 2d 234 (1961).

Many proposed new city locations may be subject to the conditions defined as blight.[56] Both blighted open areas and slums[57] may be redeveloped under Mass. Gen.

56. "Blighted open area," a predominantly open area which is detrimental to the safety, health, morals, welfare or sound growth of a city, community because it is unduly costly to develop it soundly through the ordinary operations of private enterprise by reason of the existence of ledge, rock, unsuitable soil, or other physical conditions, or by reason of the necessity for unduly expensive excavation, fill or grading, or by reason of the need for unduly expensive foundations, retaining walls or unduly expensive measures for waterproofing structures or for draining the area or for the prevention of the flooding thereof or for the protection of adjacent properties and the water table therein or for unduly expensive measures incident to building around or over rights of way through the area, or for otherwise making the area appropriate for sound development, or by reason of obsolete, inappropriate or otherwise faulty platting or subdivision, deterioration of site improvements or facilities, division of the area by rights of way, diversity of ownership of plots, or inadequacy of transportation facilities or other utilities, or by reason of tax and special assessment delinquencies, or because there has been a substantial change in business or economic conditions or practices, of an abandonment or cessation of a previous use or of work on improvements begun but not feasible to complete without the aids of the foregoing or other conditions; or a predominantly open area which by reason of any condition or combination of conditions which are not being remedied by the ordinary operations of private enterprise is of such a character that in essence it is detrimental to the safety, health, morals, welfare or sound growth of the community in which it is situated.

57. See supra notes 50 and 56 for statutory definitions of these terms.

Laws Ann., ch. 121A, by construction of residential, commercial, industrial, institutional, recreational or governmental building and such appurtenant or incidental facilities as shall be in the public interest.[58] It would be but a small extension of this holding to find condemnation for a new town program coupled with slum or blight clearance constitutional.[59]

However, the exercise of eminent domain to acquire unspoiled open land for a new town obviously must be justified on grounds other than the benefit of clearing undesirable slum and blight conditions.

C. Condemnation of Unspoiled, Open Land for New Towns

1. General criteria for a public use in Massachusetts

Few, if any, courts have dealt with the taking of unblighted vacant land alone for any purpose.[59A]

58. Opinion of the Justices to the Senate and the House of Representatives, 341 Mass. 760, 168 N. E. 2d 858 (1960).

59. Given its broad scope of permissible redevelopment, it may be that ch. 121A could, as it is, or with minimal changes, provide a basis for new city development in blighted and slum areas.

59A. Only one case, Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P. 2d 171 (1959), has been found in which a condemnation of chlice open land was proposed for a development project. The court rejected an unpersuasive legislative attempt to classify the land (over 2,000 acres of choice farmland) as "marginal" and struck down the statute. The Oregon court relied heavily on a Massachusetts case, In re Opinion of the Justices, 332 Mass. 769, 126 N. E. 2d 795 (1955), which it cited for the propositions that Condemnation of land for subsequent private industrial development was not a public use. Massachusetts courts have since abandoned the principle for which that case stood, holding instead that condemned land may be sold to private developers, if the public aspects of the project predominate over the private aspects. See, e. g., Opinion of the Justices, 334 Mass. 760, 135 N. E. 2d 665 (1956).

However, none of the general criteria for a public use enunciated by the Massachusetts Supreme Judical Court would exclude the development of a new town. Indeed, many of these general statements seem particularly relevant to the goals of a new town development. In 1860, the following broad view of the eminent domain power was expressed:

> "In a broad and comprehensive view, such as has been heretofore taken of the (Massachusetts eminent domain power), everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community.
>
> "It is on this principle, that many of the statutes of this Commonwealth by which private property has been heretofore taken and appropriated to a supposed public use are founded." [60]

In 1939, the landmark Allydonn case,[61] listed specific factors that would be considered by the court in finding a public use. It is not necessary, the court said, that each factor be present in any given situation. They are: 1) whether the benefit is available on equal terms to the entire public in the locality affected: 2) whether the service or commodity is needed by all or a large number of the public; 3) whether the enterprise bears directly upon the public welfare; 4) whether meeting the need by its nature requires unified effort under unified control; 5) whether private enterprise has failed in eradicating the evil; and 6) whether when benefits accrue to individuals,

60. Talbot v. Hudson, 82 Mass. (16 Gray) 417, 425 (1860).

61. Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, at 293, 23 N. E. 2d 665, at 667-8 (1939).

society has an interest in having them benefited.

All of these criteria for a public use are met in a plan to locate and develop new cities. The benefits of a planned new town would extend to all of Massachusetts. A portion of the state's anticipated increase in population would settle in the new location, relieving some of the pressures and problems in existing cities.[63] Massachusetts citizens of all economic and social level would have the opportunity to choose to live or work in a healthful, well-planned urban environment. The economy of the state would be stimulated by new industry and employment attracted to a new town. An increased tax base would result. As past experience has shown, the provision and protection of an adequate and satisfying living environment for large urban populations depends upon unified effort and control. The wide acceptance of government involvement in city planning and urban redevelopment is evidence of the inability of the private sector to deal with the interconnected problems of the cities. As previously noted, supra pp. 3-5 the vast expenditures, delayed return on investment and difficulty of land accumulation involved in a new city development make it impractical for private enterprise to implement this bold solution to urban ills.

62. Three other criteria, not applicable to new city development, were included: 1) whether the activity is in line with historical development of Massachusetts; 2) whether it will be necessary to use public ways or to invoke the power of eminent domain; and 3) whether a special emergency exists, such as brought about by war or public calamity.

63. Amend. Art 43 of the Mass. Constitution already gives the State power to condemn land and to improve and resell it, to provide homes and relieve population congestion.

Other "public advantages" that were influential in a finding of public use in a 1960 case were:

> "... the elimination of grave doubts as the future use of a great area, now largely vacant or occupied by a nearly obsolete, unsightly, railroad freight yard; covering over a railroad right of way; improvement to neighboring properties; the encouragement of prompt action unlikely to be undertaken by private enterprise in the foreseeable future; stimulation of other building and opening a new opportunity for urban growth...and new facilities made available to public use."[64] (emphasis added)

Clearly then there is nothing in the court's general concept of "public use" which would exclude the development of a new town.

2. Prevention of Urban Ills as a Public Use

Recent court decisions in several states including Massachusetts have found a public use in statutes providing for the elimination of blighted open land. See discussion, supra pp. 15-17. In New York, the condemnation of a "predominantly vacant, poorly developed and organized area" so that it could be "turned into sites for needed industries" was found to be a public use, even though no tangible physical blight was present. Cannata v. City of New York.[65] The broadcast definition of blighted open land in Massachusetts is "a predominantly open area...which by reason of any condition of combination of conditions which are not

64. Opinion of the Justices to the Senate and the House of Representatives, 341 Mass. 760, at 777, 168 N. E. 2d 858, at 869 (1960). The court cateloged the following elements as tending to show a private character: "any loss of tax revenue from new construction, the use and possible gain accruing to private interests from a completed project, and any other factors...tending to show a private character." Id. at 777, 168 N. E. 2d at 869.

65. 11 N. Y. 2d 210, at 215, 182 N. E. 2d 395, at 396, 227 N. Y. S. 2d 903, at 906, appeal denied, 371 U. S. 4 (1962).

being remedied by the ordinary operations of private enterprise is of such a character that in essence it is detrimental to the safety, health, morals, welfare or sound growth of the community in which it is situated."[66] In Dodge v. Prudential Life Insurance Co. of America,[67] the court found that the elimination of blighted open land thus defined was a public purpose. One of the characteristics of blight that afflicted the open area involved was that it lay in the path of and interfered with the sound growth of the city.

Since eliminating conditions that interfere with the sound growth of the community is a public purpose, it would seem logical to say that preventing these conditions by planning for the sound growth of the community, or even of the entire Commonwealth, is also a public purpose which could justify the use of eminent domain. The prevention of certain urban evils has already been held a public use in Massachusetts and elsewhere. The Supreme Judicial Court has said that in evaluating public use, " consideration may properly be given to the prevention of the development of slums adjacent to the blight." Dodge v. Prudential Insurance Co. of America, supra. The Illinois Supreme Court has also held that the prevention of slums is a permissible exercise of eminent domain:

66. Mass. Gen. Laws Ann., ch. 121A,s1. See supra note 56.

67. 343 Mass. 375, 179 N. E. 2d 234 (1961).

> "...we are aware of no constitutional principle which paralized the power of government to deal with an evil until it has reached its maximun development. Nor is there force in the argument that if the use of eminent domain in the prevention of slums is permitted 'every piece of property within the city or State can be condemned to prevent it from becoming a slum.' Legitimate use of governmental power is not prohibited because of the possibility that the power may be abused."[68]

The development of a new, well-planned city is a method of preventing future slums, as well as other potential urban ills. While this is unquestionably the case with respect to conditions in the specific area where the new city is to be located, it is also true in a broader sense. A new city will result in the prevention and alleviation of future problems in already existing towns by accommodating a portion of the population which otherwise will have settled in them. It would seem to be a much more satisfying and efficient use of the taxpayer's money to prevent blight and deterioration than to be forced to be required to wait and react after problems appear.

A New York court has upheld condemnation of specific land in Manhattan for development as a World Trade Center.[69] There is no mention in the opinion of any renewal purposes.[70]

68. People ex rel Gutknecht v. City of Chicago, 3 Ill. 2d 599, at 545. 121 N. E. 2d 791, at 795 (1954). The statute involved specifically outlined the area of Chicago in which land could be taken and also enumerated various factors which could combine to constitute the threat of transition into a slum.

69. Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 12 N. Y. 2d 379, 190 N. E. 2d 402, 240 N. Y. S. 2d 1 (1963), appeal dismissed 375 U. S. 78.

70. However, advocates of the project described the location as "appropriate for redevelopment and as presently representing 'a drain upon' the economic health of the area." Port of New York Authority, A World Trade Center in the Port of New York 25 (1961).

Rather the concept of the Center was described as:

> "It is the gathering together of all business relating to world trade that is supposed to be the great convenience held out to those who use American ports and which is supposed to attract trade with a resultant stimulus to the economic well-being of the Port of New York."[71]

The court held that "improvement of the Port of New York by facilitating the flow of commerce and centralizing all activity incident thereto" was a public purpose.[72] It is this type of advance planning for better ordering of the physical environment that a new city would embody.

3. Permitted Takings of Open, Unblighted Land

There is no judicial objection in Massachusetts to the taking of open or unblighted land as such. Where the public purpose involved does not relate to a special type of land, the Massachusetts high court has focused on the professed purpose itself. Little reference has been made to the condition of the land to be taken. The court has noted that the power to condemn land to be used for dwelling construction sites was not limited to slum areas alone. Other land could be taken, as long as the new construction

71. Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 12 N. Y. 2d 379, 190 N. E. 2d 402, at 404, 240 N. Y. S. 2d 1, at 5 (1963), appeal dismissed, 375 U. S. 78.

72. Plaintiffs argued that including within the trade center commercial enterprises not devoted to the purposes of the center except for the production of incidental revenue invalidated the project. The court reasoned that since only portions of buildings could be used for such purposes, it didn't vitiate the public purpose of the development as a whole.

was connected with slum clearance elsewhere.[73] In a later case, a statute[74] was approved which authorized the MTA to condemn land for the relocation of dwellings originally situated on land taken by eminent domain for the extension of the transit line.[75] Without discussing the type of land taken, the court held that the taking was for a public purpose because of the "emergency and distress occasioned by a housing shortage." The statute stated only that "in said city (Boston) one or more parcels of land entirely or almost entirely unoccupied by buildings" could be taken.[76] In 1954, the court[77] sanctioned the exercise of eminent domain to provide low cost public housing for the aged.[78] The proposed legislation[79] limited the land to be taken only as follows:

73. Stockus v. Boston Housing Authority, 304 Mass. 507, 24 N. E. 2d 333 (1939) (dicta).

74. Mass. St. 1949, ch. 191.

75. McLean v. City of Boston, 327 Mass. 118, 97 N. E. 2d 542 (1951).

76. Inherent within the provision was limitation on the amount of land which could be taken since only 21 buildings had to be relocated.

77. Opinion of the Justices, 331 Mass. 771, 120 N. E. 2d 198 (1954).

78. Mass. Gen Laws Ann., ch. 121, SS 26SS-26VV, Housing Projects for Elderly Persons.

79. Mass. St. 1953, ch. 667; later amended by St. 1954, ch. 667, S. 1, to declare that the provision for housing for the aged and the clearance of substandard and decadent areas were both public uses, in combination or individually. See ch. 121, S. 26SS.

> "Projects for such housing may and shall, when practicable, be established near the neighborhoods where the elderly persons reside..."

Further, land which is not decadent or substandard may be taken if it is part of a larger area so classified.[80]

> "The declared purposes of the statute (c. 121) would in many cases be thwarted if the authority must exclude from the redevelopment every adjacent parcel to which, considered by itself, the statutory definitions may not apply."[81]

It is evident, however, that each of the above situations included an implicit limitation on the amount and/or location of land to be taken. It seems likely that these limits were important, if not essential, to the courts' decisions despite the comission of any direct reference to them. If the development of new cities were an acceptable public purpose, there would appear to be no inherent limitation on what land could be taken. It is fear of such unlimited governmental discretion that has excited criticism of the trend of recent decisions to allow condemnation of land which is not seriously blighted.[82]

80. On the other hand, it is permissible not to take property within a general area classified as decadent and substandard if it is "suitable to and consistent with the new use to which the area is to be put." McAuliffe & Burke Co. v. Boston Housing Authority, 334 Mass. 28, at 31, 133 N. E. 2d 493, at 496 (1956).

81. Worcester Knitting Realty Co. v. Worcester Housing Authority, 335 Mass. 19, at 22, 138 N. E. 2d 356, at 358 (1956).

82. See, e. g., F. Miele, Eminent Domain--Urban Redevelopment--Condemnation of Predominantly Vacant Area With No Physical Blight, 38 Notre Dame Lawyer 210 (1962-63).

In order to place acceptable limits on the land subject to condemnation for redevelopment purposes, draftsmen have employed the technique of drawing ever broader definitions of "blight." The history of redevelopment statutes shows that the legislative determination of condemnable "blight" began with full-scale slums and has ended, for the moment, with open areas that interfere with the sound growth of the community. Correspondingly, the courts have step-by-step extended the public use doctrine to encompass the elimination of these various blights. It does not appear that this technique can be satisfactorily applied to condemnation of open land for new cities. To do so would involve the description of certain characteristics of prime open land---peculiarly suited for a new city--- as blight. The factors that would distinguish this particular land from other open land in the state would necessarily by those very characteristics that make it ideal for city development. To call these factors "blight" is semantically and logically unsound.

However, if some other type of specific guidelines for determining the locations of new towns were included in the enabling legislation, there would probably be a greater chance of its being upheld. These specifications would not necessarily hamper the operations of the development agency. On the contrary, some guidance in the factors to be considered in locating new cities could be helpful in the administration of the program. Most important,

limitations on land which could be condemned would tend to quiet somewhat the fears of those who see increasing governmental use of eminent domain as approaching land socialization. The sites of new cities could, for example, be limited to those areas where: 1) trends of population growth and movement indicate the strong likelihood of urban settlement; 2) there is sufficient acreage topographically suited to city development; 3) transportation and other utilities are, or can be reasonably made available; 4) a sufficient water supply is, or can be reasonably provided; 5) where industry and other employment opportunities are present, or are likely to be.[83] Additional or alternative guidelines should be formulated with the assistance of planners familiar with the requirements of such large scale developments.

The differences between currently accepted city planning and renewal techniques and the new city concept appear to be of method only. Given the state of eminent domain law in Massachusetts, it would appear to be only a matter of time until new city enabling legislation could be judicially approved.

83. These factors are similar to those usually considered in locating English new towns under the New Towns Act of 1946. The Administration of English New Towns Programs, 1965 Wash. U. L. Q. 17, at 21.

PART II: LAND USE RESTRICTIONS OF NEW TOWN SITES

It has been suggested in Massachusetts that a state agency be authorized to designate in advance large tracts of land as potential new community sites and to regulate interim land use within the area to assure its consistency with projected uses with the new town.[84] Such state-wide authority to locate and plan new cities or new communities is clearly necessary if the problems and growth trends of the entire state are to be considered and provided for adequately. Further, local communities often lack not only the personnel and financial resources to initiate and implement such programs, but also the authority to coordinate the numerous municipal governments which may exercise various types of jurisdiction over the land involved. The same reasons dictate the necessity of state control over land use in the selected location during the period between site designation and actual development of the new town.

This kind of interim control would make it feasible for this state to begin planning for new towns some years before it was financially able to implement such programs. The design of an over-all program for ordering state growth patterns would be encouraged in time to be effective if such control mechanisms were available. Acquisition and construction

84. Mass. Dept. of Community Affairs, "Problems in Defining Legislation for New Communities," April 9, 1968, at 2-3 (unpublished preliminary draft).

of new cities themselves would be possible in stages if the remaining site could be restricted in use until developed. So far land use control of this nature has been very limited. Often regional development plans, impressively comprehensive on paper, are rendered obsolete by uncontrolled encroachments of developers because there are no teeth in the guidelines.[85] It is important then that an appropriate legal technique to implement this kind of state-wide interim restriction be found.

The degree of restriction which would be placed on the affected land would depend upon how detailed were the plans for developing the area when the site was selected. If the layout of the town were fully developed and finalized, perhaps most of the individual parcels of land could be used for whatever purpose they were designated in the new town just as land within existing municipalities is available for utilization under the zoning ordinance. Even so, certain land projected as streets, parks and public buildings could not be utilized.[86] It is likely, however, that development controlled only by current zoning principles could conflict with plans for the future town. In any event, it seems probable that a detailed plan would not be available when the site selection was made. It would not be necessary to have such a plan to determine whether an area would be suitable for a new city. This decision

85. See W. Whyte, The Last Landscape (1968), ch. 8.

86. See discussion of official map plans, infra pp 41-45.

would be based on factors such as the location and amount of unused space available; its proximity to transportation, jobs, and water; and topography. Consequently, detailed planning of the development of the site would probably post-date selection of the area.[87] Further, a plan finalized some years before construction began would lack the flexibility to employ subsequent technological and city planning innovations.

The ideal situation from the planners point of view would be land virtually frozen into its present use, except for possible variances where they would clearly correspond with the eventual design of the city until the city could be built. Among the present land use control techniques which may possibly be employed to accomplish this result are easements and various schemes under the police powers, including zoning, official map plans and subdivision controls. Since a property owner need not be compensated for valid police power restrictions on his land, these techniques would obviously be most economical for the state. Their feasibility will be considered first, then.

A. Police Power Restrictions

At the outset it must be noted that any use of restrictions under the police power may run afoul of

87. This seems to be the case with British new-town planning. The Administration of The English New Towns Program, 1965 Wash. U. L. Q. 17 (1965).

an apparently pervasive doctrine prohibiting the exercise of zoning to depress the value of land slated for eventual condemnation.[88] As long as building of new cities is felt to require the developer's acquisition of the entire site, thus necessitating some use of eminent domain, this doctrine will be a serious limitation upon advance site control. See detailed discussion, infra pp. 40-43

1. Zoning

To be valid exercise of the police power, a zoning ordinance must be a resonable regulation designed to promote the public health, safety, morals or welfare.[89] Advance planning for city development has met these requirements.[90] Any zoning regulation, however, must not be so onerous a restriction on property use that it amounts to a taking which is permissible only if compensated.[91] This determination is made on a case by case basis. As yet, no court has been asked to draw the fine line between reasonable regulation and confiscatory restriction in

88. J. Krasnowiecki and J. Paul, The Preservation of Open Space in Metropolitan Areas, 110 U. Pa. L. Rev. 179 at 189 (1961).

89. Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N. E. 269 (1924).

90. Arverne Bay Const. Co. v. Thatcher, 278 N. Y. 222, 15 N. E. 2d 587 (1938): see also State ex rel Miller v. Manders, 2 Wis. 2d 365, 86 N. W. 2d 469 (1957).

91. Aronson v. Town of Sharon, 346 Mass. 598, 195 N. E. 2d 341 (1964).

the context of preserving a new town site from incompatible development.

However, temporary or interim zoning ordinances designed to preserve the status quo for as long as two years while a comprehensive zoning plan is developed for the territory involved have been upheld.[92] The greater weight of authority appears to condone this type of interim provision, although it has been invalidated in some jurisdictions.[93] Massachusetts evidently has never authorized interim zoning.[94] Such "freezes" on land use are employed to give a municipality an opportunity to initiate thoughtful, comprehensive planning without fear that haphazard development during the planning period will frustrate the plan's objectives.

> "We can perceive no constitutional objection to interim zoning when properly authorized by statute. It is common knowledge that the preparation of proper comprehensive zoning ordinance often requires much study and time. The very pendancy of the adoption of a comprehensive... zoning ordinance might precipitate action on the part of property owners in the territory to be affected which would tend to frustrate the objective"

92. Walworth Co. v. City of Elkhorn, 27 Wis. 2d 30, 133 N. W. 2d 257 (1965); Darlington v. Board of Councilmen of City of Frankfort, 282 Ky. 778, 140 S. W. 2d 392 (1940).

93. 1 Yokley, Zoning Law and Practice, ch. VI (3rd ed., 1965).

94. Whittemore v. Town Clerk of Falmouth, 299 Mass. 64, 12 N. E. 2d 187 (1937) is incorrectly sited by Yokley, Id., as invalidating interim zoning. Reference is made in Metropolitan Area Planning Council's Mass. Open Space Law, Vol. IV: Open Space and Recreation Program for Metro Boston (1968) (draft copy) to a power in towns to zone areas of conservation or other value for a brief period to prevent inconsistent development until the property can be acquired by eminent domain. No authority for this proposition is sited, however.

sought to be attained by the prospective ordinance.

A freeze on the land use in a new city site is desirable for these same reasons, and would appear to be justifiable on very similar grounds. It is very questionable, however, whether such restrictions would be valid for longer than a reasonable planning period, generally defined as two years in the current statutes.[96] Unlike a comprehensive zoning plan which can be effectuated immediately upon completion, the implementation of a state-wide program for new town development may be delayed some time for obvious financial and political reasons.[97] Site control would be senseless unless enforceable until development actually begins. To determine whether similar restrictions can be applied for longer periods, cases dealing with the use of zoning to preserve historical districts, open space and low density residential developments

95. Walworth Co. v. City of Elkhorn, 27 Wis. 2d 30, at 38-39, 133 N. W. 2d 257, at 262 (1965).

96. See Wis. Stat. Ann. S. 62.23 (72) (b) (Supp. 1969) which provides for an extension of one year beyond the initial two, if necessary.

97. For example, an academic design study of a new town set in a rural area of Foxboro, Mass., was enough to arouse opposition to the idea in nearby communities. Boston Globe, March 2, 1969, at A-63, col. 1. See Harvard University School of Design, New Communities: One Alternative, A Harvard Study of a New City, June, 1968.

are particularly relevant.

In Massachusetts, cities and towns are authorized[98] to establish historic district commissions[99] which may exercise extensive control over the external appearance of a given locale. This power has been twice upheld in advisory opinions by the Supreme Judicial Court on the grounds that preservation of historic places, buildings and districts is in the public interest.[100] Commissioners are authorized to pass on the suitability of any construction, reconstruction, alteration or demolition of any structure in the district and to control the change of any external architectural feature within the area designated for preservation.[101] Variances must be granted where the land owner would undergo "substantial hardship" otherwise and the variance would not have substantial detriment to the purpose of the statute.[102]

Effective interim control of a proposed new town site would similarly involve regulation of construction,

98. Mass. Gen. Laws Ann., ch. 40C.

99. At least 16 historic districts now exist. Mass. S. Rep. No. 1133, at 59 (1968).

100. Opinion of the Justices to the Senate, 333 Mass. 773, 128 N. E. 2d 557 (1955) (Nantucket); Opinion of the Justices to the Senate, 333 Mass. 783, 128 N. E. 2d 563 (1955) (Boston's Beacon Hill). Massachusetts also provided in 1918 by constitutional amendment, Amend. Art. 51, that preservation of historic areas is a public use justifying the exercise of eminent domain.

101. Mass. Gen. Laws Ann., ch. 40C, S. 5; the actual use of a building is not controlled by the historic district commission. Opinion of the Justices to the Senate, 333 Mass. 773, 128 N. E. 2d 557 (1955).

102. Mass. Gen. Laws Ann., ch. 40C, S. 7.

reconstruction, and alterations of building within the area, although there would be no reason to control external appearances.[103] However, it seems unlikely that historic district zoning would be persuasive precedent for validating such interim control. Historic zoning is justified as placing the burden of the restriction upon the party whose conduct would produce the undesired effect on the community. However, if, without reference to any possible injurious conduct of his, the landowner were forced to confer a public benefit, as would be the case if the law were designed to create, rather than maintain, such an area on his land, the zoning would be unconstitutional.[104] While planning for the future growth of cities has been upheld as in the public interest,[105] ironically, it has never justified the degree of control applied to preserve the past.

Nor have zoning attempts to maintain vacant or open land in its natural condition met with much success in Massachusetts or any other jurisdictions. While required minimum lot size of one acre was held a reasonable use of zoning in Massachusetts, the court discouraged this approach to city planning:

103. Use control would comprise a continuation of the status quo.

104. Comment, The Police Power, Eminent Domain, and the Preservation of Historic Property, 63 Colum. L. Rev. 708 (1963).

105. See, supra note 90. See also discussion of official map plans, infra pp. 41-45.

> "A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed nor for the purpose of protecting the large estates that are already located in the district."[106]

Later, an ordinance establishing minimum lot sizes of 100,000 square feet (over two acres) was invalidated despite arguments that this would encourage leaving land in its natural state. The court said:

> "Granting the value of recreational areas to the community as a whole, the burden of providing them should not be bourne by the individual owner unless he is compensated."[107]

The zoning of land as a flood plain has been invalidated in other states where the permitted uses for the area were so impractical with respect to the land involved that it was virtually required to remain vacant.[108] The New Jersey Supreme Court expressed these considerations:

> "While the issue of regulation as against taking is always a matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention basis or open space. These are laudable public purposes...But such factors cannot cure basic unconstitutionality....Both public uses

106. Simon v. Town of Needham, 311 Mass. 560, at 565-566, 42 N. E. 2d 516, at 519, 141 A. L. R. 688 (1942).

107. Aronson v. Town of Sharon, 346 Mass. 598, at 604, 195 N. E. 2d 341, at 345 (1964).

108. Dooley v. Town Plan and Zoning Comm'n of the Town of Fairfield, 151 Conn, 304, 197 A. 2d 770 (1964); Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N. J. 539, 193 A. 2d 232 (1963).

> are necessarily so all-encompassing as practically to prevent exercise by a private owner of any worthwhile rights or benefits in the land. So public acquisition rather than regulation is required."[109]

The Massachusetts Supreme Judicial Court, in reviewing a state statute[110] authorizing municipal control over the use of coastal marsh lands, intimated that the flood plains cases would be followed in Massachusetts.[111]

Thus, it seems clear that a land owner cannot be forced by zoning to hold his land unproductively vacant permanently in order to provide open space or conservation benefits to the entire community.[112] The duration of the restriction, however, is an important distinguishing feature between holding land as recreation and conservation "open space" and holding land until it can become part of a controlled development. Open space can make a really meaningful contribution to improving urban life only if it is to be a virtually permanent feature of the area. By contrast the restrictions necessary to preserve a new town site are shortly terminable either by construction or

109. Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N. J. at 555, 193 A. 2d at 241 (1963).

110. Mass. Gen. Laws Ann., ch. 130, S. 27A (Supp. 1969).

111. Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N. E. 2d 666 (1965).

112. See J. Krasnowiecki and J. Paul, The Preservation of Open Space in Metropolitan Areas, 110 U. Pa. L. Rev. 179 (1961); Note: Techniques for Preserving Open Spaces, 75 Harv. L. Rev. 1622, (1962); W. Whyte, The Last Landscape, ch. 3 (1968).

abandonment of the project. The length of time a landowner's property is rendered unproductive bears on the validity of the ordinance. The New York Court of Appeals made these observations in the context of residential zoning:

> "An ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property....
>
> "The situation, of course, might be quite different where it appears that within a reasonable time the property can be put to a profitable use. The temporary inconvenience or even hardship of holding unproductive property might then be compensated by ultimate benefit to the owner or, perhaps, even without such compensation, the individual owners might be compelled to bear a temporary burden in order to promote the public good."[113] (emphasis in original)

There is little case guidance in defining a reasonable length of time.[114] A long-standing ordinance which was designed to control future development in a large, undeveloped area has been upheld in Massachusetts.[115] The court said the ordinance which had classified for over fifteen years some 2,000 acres of nearly open land as a single residence district served the public interest:

> "...It preserved the area not then built upon for future use for single residence construction to the exclusion of construction not desirable in single

113. Arverne Bay Const. Co. v. Thatcher, 278 N. Y. 222, at 232, 15 N. E. 2d 587, at 592 (1938) (dicta). This case was cited approvingly by the Mass. Supreme Judicial Court in Commissioner of Natural Resources v. S. Volpe & Co. 349 Mass. 104, 206 N. E. 2d 666 (1965).

114. But see interim zoning cases discussion, supra pp. 32-33

115. Wilbur v. City of Newton, 302 Mass. 38, at 40; 18 N. E. 2d 365, at 367 (1938).

> residence districts in accordance with the probable trend and with the preferences of the City of Newton..."

However, residential zoning has been invalidated where there was only a "more or less remote possibility" that sometime in the immediate or distant future the land could be so used.[116] However, earlier, in a similar situation, the New York Court of Appeals suggested that a temporary variance was sufficient to rectify any unfairness to the landowner.[117] Plaintiff's land was zoned for business, although there were no homes in the area to support a business and there was no practical way to provide parking facilities to draw business customers from the nearby highways. The court granted a temporary variance for a gas station emphasizing the relatively small capital loss which would be entailed in removing the station when the area had eventually developed enough to support a business as zoned.

> "The erection of the station in order to meet a temporary need will not be permitted to thwart for all time a far-sighted system of municipal development."[118]

A happy compromise was fortuitiously available in that case. There is no hint what the result would have been

116. Barney & Casey Co. v. Town of Milton, 324 Mass. 440, 87 N. E. 2d 9 (1949).

117. People ex rel St. Albans-Springfield Corp. v. Connell, 257 N. Y. 73, 177 N. E. 313 (1931).

118. Id., 257 N. Y. at 77, 177 N. E. at 316.

had the plaintiff proposed the construction of a facility requiring far more capital outlay, but equally appropriate for the area. This approach does, however, suggest the posible validity of an interim zoning restraint on land designated as a new town site, subject at most to temporary variances.[119] However, as previously noted, the proposed use of eminent domain to accumulate land for the site adds an extra dimension to the problem of advance regulation.

It is generally held that zoning cannot constitutionally be used to prevent land use changes or improvements to save the municipality expense in its subsequent condemnation of the land.[120] Evidently, no Massachusetts case has specifically so held; however, in Aronson v. Town of Sharon, supra p. 36, the court struck down a minimum lot requirement of 100,000 square feet noting that a "positive program of land acquisition for the town itself" was envisioned for the area so zoned.[121] This

119. But see J. Krasnowiecki and J. Paul, The Preservation of Open Space in Metropolitan Areas, 110 U. Pa. L. Rev. 179, at 188 (1961) who rule out zoning as a temporary restriction on development.

120. See, e. g., Long v. City of Highland Park, 329 Mich. 146; 45 N. W. 2d 10 (1950); Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P. 2d 10 (Dist. Ct. App. 1958); 59 Front St. Realty Corp. v. Klaess, 6 Misc. 2d 774, 160 N. Y. S. 2d 265 (Sup. Ct. 1957); and 2700 Irving Park Bldg. Corp. v. City of Chicago, 395 Ill. 138, 69 N. E. 2d 827 (1946). See also, infra notes 129 and 130.

121. 346 Mass. 598, at 604, 195 N. E. 2d 34km at 345 (1964).

category of cases would appear to invalidate the restrictive zoning of a new town site of which as yet unascertainable portions will be acquired by eminent domain. However, another group of cases validating certain restrictions on land scheduled for condemnation under "official map plans" suggest possible grounds of distinction.[122]

2. Official Map Plans

Official map plans, in fact, are said to be designed to assure that the land needed for future public facilities is available at bare land prices.[123] It must be noted here that Massachusetts does not currently subscribe to this type of official map plan. See discussion, infra p. 45.

Under the official map approach, municipalities may designate the future locations of streets, highways and parkways. A "savings clause" permits the landowner to improve his land within these designated areas only when his property cannot "yeild a reasonable return"[124]

122. State ex rel Miller v. Manders, 2 Wis. 2d 365, 86 N. W. 2d 469 (1957); Vangellow v. City of Rochester, 190 Misc. 128, 71 N. Y. S. 2d 672 (Sup. Ct. 1947) (dicta); and Rochester Business Institute, Inc. v. City of Rochester, 25 App. Div. 2d 97, 267 N. Y. S. 2d 274 (Sup. Ct. 1966).

123. J. Kucirek and J. Beuscher, Wisconsin's Official Map Law: Its Current Popularity and Implications for Conveyancing and Planning, 1957 Wis. L. Rev. 176.

124. Wis. Stat. Ann., S. 62.23 (6)(d) (Supp. 1969); Penn. Stat. Ann., tit. 53, S. 10405 (Supp. 1969); N. J. Stat. Ann., tit. 40:55-1.38 (Supp. 1968-69); and N. Y. General City Law, S. 35 (McKinney 1968).

otherwise.[125] Further, permission for such improvements may be conditioned so as to add as little cost to the subsequent opening of the facility as practicable and to cause minimum interference with the overall projected street plan.[126]

This right to exercise the police power to protect a municipality against the added costs of future condemnation or purchase of property needed for a public improvement, however, is subject to rather narrow limits. In upholding an official map, the Wisconsin Supreme Court[127] stressed the "savings clause" protecting the owner from "substantial damage" and the lack of legislative intent to depress land values. Similar factors have influenced the New York courts which have validated application of the official map plan as long as there was no material diminution in value or usefulness of the premises.[128]

125. This savings clause may be essential to the constitutionality of the plan. State ex rel Miller v. Manders, 2 Wis. 2d 365, 86 N. W. 2d 469 (1957). But see In re Harrison's Estate, 250 Pa. 129, 95 A. 406 (1915) upholding an early ordinance which included no savings clause. A later decision, Miller v. City of Beaver Falls, 36 Pa. 189, 82 A. 2d 34 (1951) casts doubt upon this long established practice. The 1968 reenactment of the Penn. Official Map provisions now include such a savings clause. Penn. Stat. Ann., tit. 53, SS. 10401-10408 (Supp. 1969).

126. See Wis. Stat. Ann. S. 62.23 (6) (d) (Supp. 1969); N. J. Stat. Ann., tit. 40:55-1.38 (Supp.1968-69) and N. Y. General City Law, S 35 (McKinney 1968).

127. State ex rel Miller v. Manders, 2 Wis. 2d 365, 86 N. W. 2d 469 (1957).

128. See, infra notes 134, 135 & 136 and accompanying text.

The courts' reconciliation of the official map plan with the cases invalidating the zoning of land scheduled for condemnation is not totally satisfactory. Many of the latter cases do stress the depressant effect of the ordinance on land value. At least one court, however, has also been adversely influenced by the savings in land clearance costs resulting to the city from a "set back" requirement.[129] This effect would be present under an official map, even if the land value were not depressed. On the other hand, courts have generally been influenced by the amount of the decrease in land value caused by the zoning in question. In at least one case this decrease was considered so great as to invalidate the ordinance as confiscatory regardless of any intent to subsequently condemn the area.[130] Presumably, an official map plan's savings clause would eliminate decreases in land values of such magnitude.

Even were this issue resolved favorably, there are several further difficulties with extending the official map plan approach to regulate an entire new town location. To date the restrictions under an official map have not been successfully extended beyond street, parkway and highway locations, except on a temporary basis. Reservations of park and playground locations which have been con-

129. Galt v. Cook County, 405, 111, 396, 91 N.E. 2d 395 (1950).

130. State ex rel Tingley v. Gurda, 209 Wis. 63, 243 N. W. 317 (1932).

stitutional for thirteen months,[131] have been invalidated when imposed for three years:

> "The action of the City of Beaver Falls (Pa.) in plotting this ground for a park or playground and freezing it for three years is, in reality, a taking of property by possibility, contingency, blockade and subterfuge, in violation of the clear mandate of our Constitution that property cannot be taken or injured or applied to public use without just compensation..."[132]

The reservation of parks and playgrounds in current statutes is often limited to no more than one year and even so is subject to the savings clause applicable to lengthier reservations for streets and highways.[133]

As shown by the New York experience, the presence of the savings clause itself operates so as to allow considerable development in the restricted area. Thus, a showroom may be constructed although limited to one story if greater height is unnecessary to avoid interfering with or diminishing the value of the landowner's present property rights.[134] A 14-foot setback requirement

131. Serra v. Iglesias, 71 P. R. 139 (1950).

132. Miller v. City of Beaver Falls, 36 Pa. 189, at 194, 82 A. 2d 34, at 37. The court here somewhat unconvincingly distinguished streets and highways as "narrow, well-defined and absolutely necessary" in contrast to parks and playgrounds which may be "very large and desirable but not necessary." It characterized the official map practice with respect to streets as of questionable constitutionality too long entrenched for reversal at this point. See, supra note 125.

133. See N. J. Stat. Ann., tit. 40:55-1.32 (Supp. 1968-69); Penn. Stat. Ann., tit. 53, S. 10406 (Supp. 1969).

134. Vangellow v. City of Rochester, 190 Misc. 128, 71 N. Y. S. 2d 672 (Sup. Ct. 1947).

which resulted in a 7.1 per cent land loss, and a six per cent, or $150,000, increase in construction costs--but with no loss in projected rental income--is a permissible restriction.[135] However, a permit to build in a future roadway cannot be conditioned by setting for future [illegible] eminent domain compensation purposes a ten per cent annual depreciation rate on the building where the natural decline is closer to two per cent yearly.[136]

Finally, in Massachusetts, the official map plan controls on land use, unlike those in New York, Wisconsin, New Jersey and Pennsylvania, are based not on the police power, but on eminent domain. The relevant statute provides:

> "A city or town...may establish, in the manner provided for the laying out of city or town ways, the exterior lines of any way,...and thereafter no structure shall be erected or [illegible] the exterior lines so established...Any person injured in his property by the establishment of exterior lines under this section may recover damages so caused under (the eminent domain statute)."[137]

The statute has taken this form since at least 1947, prior to the recent New York and Wisconsin cases upholding such restrictions as excercises of the police power.[138] Consequently,

135. Rochester Business Institute, Inc. v. City of Rochester, 25 App. Div. 2d 97, 267 N. Y. S. 2d 274 (1966).

136. Rand v. City of New York, 3 Misc. 2d 769, 155 N. Y. S. 2d 753 (Sup. Ct. 1956). Contrast People ex rel St. Albans-Springfield Corp. v. Connell, 257 N. Y. 73, 177 N. E. 313 (1931), discussed supra p. 39, where a temporary building variance was acceptable evidently because no subsequent condemnation was anticipated.

137. Mass. Gen. Laws Ann., ch. 41, S. 81J.

138. See, supra notes 127, 134, 135 and 136, and accompanying text.

it may not represent the current frontiers of judicial acceptance of land use regulation in Massachusetts.[139] However, the enactment of new town controls based on the official map approach would face the additional burden of amending this long-standing statute.

3. Subdivision Controls.

Another type of police power regulation, subdivision, control, has been employed to delay or prohibit the development of land in certain circumstances.[140] Subdivision regulations, obviously, are limited to development involving the division of tracts of land into smaller lots,[141] and, consequently, would provide insufficient protection for a future city site. Further, only minimal restrictions on subdivisions are permissible in Massachusetts. Subdivision plans are required to conform to the recommendation of local board of health and are subject to regulations of the pertinent planning board.[142] However, permission to proceed with such a project may not be withheld even

139. However, a similar attitude toward the police power is manifested in the subdivision control law. In contrast to many jurisdictions, (see J. Johnston, Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 Cornell L. Q. 871 (1966-67), Massachusetts does not authorize the uncompensated dedication of land for public uses, such as parks, streets and playgrounds. Mass. Gen. Laws Ann., ch. 41, S. 81Q.

140. J. Johnston, Constitutionality of Subdivision Control Exactions: The Quest For a Rationale, 52 Cornell L. Q. 871 (1966-67).

141. Mass. Gen. Laws Ann., ch. 41, S. 81L.

142. Mass. Gen. Laws Ann., ch. 41, S. 81M.

though its execution might accentuate and existing water shortage,[143] or because it would necessitate extra municipal expenditures for sewerage and flood control.[144] This technique could scarcely be used, then, to effect the stringent controls desirable to preserve a new town site.

Despite the many apparently unsurmountable difficulties in employing the police power for interim site control, a detailed discussion of these techniques is warranted since alterations in the new town approach might allow their use. For example, if it were possible to avoid accumulating the entire site under a single ownership prior to development, the need for eminent domain powers would diminish, along with the constitutional problems discussed above, pp. 30-31, 40-43.

B. Development Rights Easements

A method of controlling interim development in the selected site which compensates landowners for the burden on their lands is considerably more likely to be approved by the courts than regulation under the police powers. By purchasing or condemning permanent or temporary "development rights" easements, the state could assure that land uses would remain constant. Similar programs of acquiring development rights (called conservation easements) have

143. Daley Construction Co., Inc. v. Planning Board of Randolph, 340 Mass. 149, 163 N. E. 2d 27 (1959).

144. Baker v. Planning Board of Framingham, 353 Mass. 141, 228 N. E. 2d 831 (1967).

been advocated to provide permanent open spaces for recreation and conservation.[145] The taking of easements by eminent domain has long been a familiar concept in American property law.[146] Easements need not be perpetual, but may be for a term of years.[147] The traditional easement has involved acquiring a positive use of the land,[148] in contrast to development rights or conservation easements which are negative easements prohibiting certain land uses. Governmental use of negative easements is relatively new, and, consequently, few courts have considered the validity of condemning such interests in land. The Wisconsin Supreme Court, in a landmark case,[149] has, however, held that the condemnation of scenic easements along highways is for a public use. It has been suggested earlier that condemnation in fee for new town development would qualify in Massachusetts as a public use, supra pp. 9-27

145. Note, Techniques for Preserving Open Spaces, 75 Harv. L. Rev. 1622 (1962); W. White, The Last Landscape (1968); Metropolitan Area Planning Council, Massachusetts Open Space Law, Vol. IV: Open Space and Recreation Program for Metro Boston (1968) (unpublished draft).

146. United States v. Cress, 243 U. S. 316, 37 S. Ct. 380, 61 L. Ed. 746 (1917).

147. John Hancock Mut. Life Ins. Co. v. Casey, 147 F. 2d 762 (1st Cir. 1945).

148. See, e. g., Agostini v. North Adams Gaslight Co., 265 Mass. 70, 163 N. E. 745 (1928).

149. Kambrowski v. State, 31 Wis. 2d 256, 142 N. W. 2d 793 (1966).

That reasoning should be equally applicable to takings of lesser interests, such as easements.

Massachusetts courts have not dealt with the acquisition by eminent domain of conservation or development rights easements. However, several recent statutes authorize such action: for the protection of coastal wetlands,[150] to provide trails and paths to scenic areas,[151] to acquire open spaces and other land and water areas for conservation purposes,[152] and to plant trees and shrubs in designated plots near rivers and ponds.[153] The latter easement may be "forever, or for such period of time as the commission deems expedient..."

As restrictions on land, easements would be subject to the Massachusetts "Marketable Title Act,"[154] which holds restrictions unlimited as to time to a 30-year life span and requires periodic rerecording of limited restrictions. Any new town legislation authorizing the acquisition of easements should make provision to deal with these technical requirements.[155] It may be wise to exempt such

150. Mass. Gen. Laws Ann., ch. 130, S. 105 (Supp. 1962).

151. Mass. Gen. Laws Ann., ch. 132, S. 38.

152. Mass. Gen. Laws Ann., ch. 40, S. 8C (Supp. 1969).

153. Mass. Gen. Laws Ann., ch. 92, S. 79.

154. Mass. Gen. Laws Ann., ch. 184, S. 23; Mass. Gen. Laws Ann., ch. 184, SS. 26-30.

155. Legislation to cover these points with respect to conservation easements has been drafted. See Mass. Public Document No. 144 at 109 (1966).

easements from the rerecording requirements, and to provide a wide another means of conveying notice of such restrictions.

Further, an easement will be unenforceable unless it is of "actual and substantial benefit" to the party seeking to enforce it.[156] The benefits to the state of a state-wide new town program would almost certainly satisfy this requirement. It has not been considered a problem with respect to the enforcement of conservation easements.[157]

The actual cost of obtaining development rights easements will, of course, be a function of the value of the land restricted and its potential for development. Compensation for perpetual easements has ordinarily been measured by reducing the fair market value of the land immediately before imposition of the easement by the value immediately after.[158] Temporary easements, on the other hand, are valued at the market rental value of the estate acquired.[159] Compensation for the subsequent condemnation

156. Mass. Gen. Laws Ann., ch. 184, S. 30 (Supp. 1969).

157. Mass. Pub. Doc. No. 144 at 103 (1966).

158. United States ex rel Tennessee Valley Authority v. An Easement and Right of Way, etc., 182 F. Supp. 899 (M. D. Tenn. 1960). For criticism of this formula, see W. West, Condemnation of Limited Use Easements, 1964 Institute on Eminent Domain 109.

159. Kimbell Laundry Co. v. United States, 338 U. S. 1, 93 L. Ed. 1765, 69 Sup. Ct. 1434 (1949). This formula is more difficult to apply in the context of a negative easement than in the typical positive easement.

in fee of the restricted land would no doubt be based on the traditional formula--the fair market value of the land at the time of the taking.[160] A similar scheme for taking an easement until total acquisition by eminent domain is feasible has been proposed to preserve historical landmarks. There it was suggested that in addition to a total payment equalling the fair market value of his unrestricted property, the landowner should also receive interest on that amount from the time the easement was taken.[161] The payment of interest does not seem necessary, however, since the landowner has the benefit of the existing use of his property for the interim period.

The choice between acquiring temporary or permanent development rights easements may turn upon the amount of money immediately available. Certain other cost factors should be considered, however. If a permanent easement is taken, the development potential of the land would not be a factor to consider when the ultimate compensation for the fee was computed. However, if a less costly, temporary easement had been employed to control interim land uses, conpensation for the fee would have to take into account the future development potential. Theoretically, the total cost to the State should be equal whichever length of easement is employed.[162] However, it seems likely that unanticipated development potential may

160. Tigar v. Mystic River Bridge Auth., 329 Mass. 514, 109 N. E. 2d 148 (1952).

161. Comment, Landmark Preservation Laws: Compensation for Temporary Taking, 35 U. Chi. L. Rev. 362 (1968).

162. Excluding any inflationary effect on the dollar amount involved.

become evident during the period of time between the imposition of the easement and the ultimate condemnation which would not have been considered when original easement was valued. If only a temporary easement were involved, this newly apparent potential would tend to increase the ultimate compensation. This is clearly true if the temporary easement were for a specified term of years. If it were periodically renewable, the increased development potential would not be reflected in the ultimate compensation, because the land could effectively be permanently restricted, but rather in the annual rental payments for the development rights. In either case, the temporary easement and subsequent total condemnation would be more costly than a permanent easement.

Despite the expense of easements, they appear to be the most feasible mode of imposing interim restraints on land use in future new city locations. However, the limitations on police power restrictions and the financial costs and alleged inflexibility of easements, [163] especially permanent easements, have led some commentators to seek a third alternative.

163. Inflexibility is not a serious matter where, as here, the restrictions will terminate with new city construction in a relatively short time. Permanent easements designed to preserve recreation or conservation open space may pose a more significant problem in this respect. In all cases, however, it is within the state's power to release easement it holds.

C. An Alternative Approach

Two University of Pennsylvania Law School professors have proposed model legislation embodying a technique designed to assure that private development of designated property can be prohibited by state governments without the expense of acquiring title to the land.[164] Such undeveloped areas will provide, among other benefits, permanent recreation and scenic open areas and "green-belts" separating urban communities, as well as temporary reservations of land designated for future public facilities and temporary respite from unwanted urbanization which would necessitate unreasonable public expenditures for various facilities and services. The suggested legislation provides that once an area is selected for open space, the properties within would be valued just as though they had been condemned. This amount is the "owner's guarantee" of compensation for his land. Restrictions controlling the property for open space purposes would be immediately imposed. If these controls depressed the value of the land for its present use, the owner is entitled to the payment of damages which, in turn, are deducted from the total amount guaranteed him. The owner may be compensated for the lost opportunity to put his property to new use only by selling the land

164. J. Krasnowiecki and J. Paul, The Preservation of Open Space in Metropolitan Areas, 110 U. Pa. L. Rev. 179 (1961).

at a supervised public sale. The amount paid for the land if lower than the remaining guarantee will be supplemented by the state to equal that amount. Active bidding is encouraged by setting the purchaser's "owner's guarantee" at the amount he actually paid.

This plan, its authors state, will be less costly to the community and will avoid concentration of costs during the period of initial regulation. Further, they suggest that, in contrast to the acquisition of development easements, their proposal compensates a land owner for future development rights only if and when he would normally forego his present use.

> "...it is unfair to require the community to pay compensation, based on the usual conflicting testimony, for values, real or imaginary which the owner himself has no intention to realize."[165]

Applied to provide temporary control over a new town site, this plan is less likely to be subject to the [illegible] doctrine prohibiting the use of the police powers to decrease the cost of an anticipated condemnation of the land involved than are the traditional techniques discussed above, supra pp. 30-46.[166] This approach includes the saving factor of immediately-available conpensation for any loss in the value of the land for existing uses. The owner at his option may receive compensation for the

165. Id., at 199

166. But of., Note, Techniques for Preserving Open Spaces, 75 Harv. L. Rev. 1622 (1962).

loss of future development value by selling the land.[167] Such cash payments are a considerably more effective and easily administered method of assuring that the land value will not decrease below its present value than are the official map savings clauses permitting restricted development to achieve that result. But the danger that a court may extend this doctrine to include savings in clearing the land after acquisition as the Illinois Supreme Court has done still exists.[168]

There appear to be other practical difficulties with the proposal. Land permanently restricted is not likely to be sought after when sold at public auction unless there is some profitable existing use.[169] If so, the attraction to potential purchasers in a healthy market would be the income generated by this use, not the prospect of recovering the exact amount of the investment some years hence. Consequently, buyers would have no incentive--except the somewhat unlikely prospect of competitive bidding at the public land auction--to bid more than minimal amounts for the property. The state, required to make up the rest of the owner's guarantee, would be saving very little. Land temporarily restricted, but slated for condemnation, as in our situation, would be especially unappealing to buyers. Land which attracted

167. The fact that the owner must give up his land to receive compensation can be no more objectionable than the use of eminent domain.

168. Galt v. Cook County, 405 Ill. 396, 91 N. E. 2d 395 (1950).

169. Note, Techniques Preserving Open Spaces, 75 Harv. L. Rev. 1622 (1962).

no bidders would have to be purchased by the state just as if condemned. In this case, the only difference between the new proposal and the use of an easement and subsequent condemnation would appear to be in the relative sizes of the first payment. Under the new proposal, the land owner might receive no payment until he sells. At best he would get an amount equal to the injury to his current use. It is likely, that this payment would be smaller than an easement of future development potential, but this would not always be true. The only advantage then to the new plan would be the chance that more of the total payment would be deferred.

The plan expressly insures that the landowner will receive the dollar amount set as his "owner's guarantee" even should a "general drop in the real estate market" occur.[170] This guarantee could become a very serious financial drain on the taxpayers during a general depression. While it is possible this burden might be avoided if enough wealthy people were encouraged to buy at normal or high prices, lured by the attraction--relative to general conditions--of a guaranteed return of the exact dollar amount invested, this is at best an unpredictable form of protection. Although an optimistic outlook is currently fashionable, it is still unwise to totally ignore the possibility of general economic reverses.

170. J. Krasnowiecki and J. Paul, The Preservation of Open Space in Metropolitan Areas, 110 U. Pa. L. Rev. 179, at 229 (1961).

Despite its defects, this proposal is a very welcome attempt at innovation in a body of law until recently noted more for its antiquities than its rationality.

Conclusion

Typically, the judiciary is slow to accept legislative innovations which appear to threaten traditional principles of private property ownership. Not until popular sentiment is strongly behind the changes (and somestimes not even then), do the courts confer their essential blessing. Thus, until the popular imagination rallies behind the idea of establishing new towns, judicial approval of enabling legislation may not be forthcoming. Yet to delay acceptance of new towns or other similar methods of controlling the run-away urban sprawl which is choking and draining America's cities virtually guarantees the increased deterioration of urban centers as new, unplanned, commercial, residential and industrial enclaves sprout on their outskirts.

A ready illustration is the commercial and industrial development present and projected for Route 128 and Route 495, freeways, which, in two concentric semi-circles, arc through numerous communities surrounding Boston. Some planners view the Route 495 area as the probable focus of the biggest population and employment

growth in Massachusetts during the next two decades.[171] Already large corporations are making hugh land acquisitions near the highway.[172] Few, if any, of the communities soon to be transformed by such growth, are making preparations to structure it. If Route 495 continues to reflect the earlier urbanization patterns of Route 128, it will witness the haphazard location of literally dozens of industrial parks, shopping centers and housing tracts. It is utterly essential for the state to act now to structure this growth. The new city concept seems to be the best method advanced so far, including as it does numerous attendant benefits.

The stage is set to condemn slum or blighted areas to create new communities. The clearance and redevelopment of such areas into virtually all the types of facilities which comprise a city has already been judicially sanctioned in the Commonwealth. Condemnation of relatively open, unspoiled land, such as exists near Route 495 and 128, is logically sound, requiring only that the judiciary extend "public use" to include "prevention" as well as "cure" of urban problems.

Other selected areas in the State, currently unthreatened by haphazard development, should be preserved for future ordered urbanization. Buying or condemning development rights easements appears to be a readily

171. Boston Globe, March 16, 1969, at 12, col. 3 (Commercial and Industrial Real Estate, Spring Review Supplement).

172. Id.

available way to effect this. Efforts to tailor development controls to fit within the umbrella of police power regulations should continue to be made. Equally important, more attempts to devise workable and acceptable land use controls which include the best of the various techniques currently available are in order.

The End

This Publication No. #3073 approved by Alfred C. Holland, Purchasing Agent

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Certain Legal Problems Suggested by the Creation of New Towns in Massachusetts.